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The Elusive Right to Reinstatement under the Family Medical Leave Act

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Imagine that you work for an employer covered by the Family Medical Leave Act ("FMLA") and seek to take leave after the birth of a child or to care for an ill parent. You understand your leave is unpaid and limited to twelve weeks, but you are thankful for this relatively new opportunity to take time off from work for personal reasons. Yet, imagine your surprise when you return to work only to find that your position has been eliminated or that your employer has decided that your position needed to be filled while you were on leave. This experience would, at the very least, cause you to doubt whether the FMLA is living up to its promise to "balance the demands of the workplace with the needs" of employees to take leave for eligible medical conditions and compelling family reasons.[1]

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[1] 29 U.S.C. § 2601(b) (1999).

The FMLA entitles eligible employees to a maximum of twelve weeks of unpaid leave for health-related reasons,[2] and provides for the right of reinstatement so that an employee can return to work after taking leave.[3] Yet, since the FMLA's passage nearly ten years ago, courts have curtailed this right of reinstatement. Courts have placed the burden on employees to prove that the employer did not have a legitimate reason to refuse reinstatement, while limiting consideration of proof that the reason offered by the employer is really a pretext for adverse treatment based on the employee's use of FMLA leave.[4] In addition, while the FMLA provides for reinstatement to the same or an equivalent position, an employer may be able to manipulate the availability of equivalent work with an underlying motive to deny the right of reinstatement.[5]

To fulfill its promise, the FMLA should be interpreted to allow an employee a more meaningful right of reinstatement after taking FMLA leave. The courts can do this by interpreting the FMLA's positive right of reinstatement as the rule rather than the exception, and by adhering to the Department of Labor's placement of the burden on the employer to establish the right to claim an exception to that right. Moreover, even though intent is not an element of entitlement to the right of reinstatement, employees who have taken FMLA leave should be given an opportunity to establish that the employer's proffered reason for not reinstating the employee is a pretext for denying the right. Only then will employees enjoy the meaningful right to reinstatement that the FMLA envisioned.

As some courts have recognized, employees should be able to protect their right to reinstatement by disproving the legitimacy of employers' reasons for refusing to reinstate them.[6] Employees should be able to use

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[2] Reasons for leave include leave because of the employee's own serious health condition that makes the employee unable to perform the functions of his or her position, and caring for a child, spouse, or parent with a serious health condition. 29 U.S.C. § 2612(a)(1)(C)-(D) (1999).

[3] 29 U.S.C. § 2614 (a)(1) (1999).

[4] *See, e.g.*, Kohls v. Beverly Enters. Wis., Inc., 259 F.3d 799, 804-06 (7th Cir. 2001) (holding that the plaintiff did not meet her burden and that showing a pretext did not "necessarily satisfy the employee's burden").

[5] Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc., No. 00 Civ. 5207, 2002 U.S. Dist. LEXIS 9358, at *17 (S.D.N.Y. May 28, 2002) (ruling the "sole determining factor" for eliminating the plaintiff's position was due to her FMLA leave).

[6] *See, e.g.*, Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 962 (10th Cir. 2002) (holding that plaintiff had sufficient evidence to show continued employment "had she not taken FMLA leave").

evidence of intent to challenge employers' failure to reinstate based on employees' performance, inability to perform the duties of the position, or an employers' elimination of their position. Employers may mask their intent to punish employees for taking FMLA leave by failing to reinstate them to equivalent positions, or by designating them as "key employees"[7] who are not entitled to reinstatement. Without an opportunity to challenge employers' reasons with such evidence of intent, employers can easily escape their positive obligation to reinstate employees after their FMLA leave and consequently frustrate the purposes of the Act.

This Article explores the decisions of various appellate courts reviewing reinstatement claims under the FMLA. Part I reviews the relevant provisions and legislative history of the FMLA.[8] Part II discusses the various allocations by the courts of the burden of proof under the FMLA.[9] The role of intent is examined in Part III, which highlights courts that have allowed enployees to present evidence of employers' underlying intent to refuse to reinstate because the employee has taken FMLA leave.[10] This discourse on the role of intent is carried over in Part IV where comparable provisions of the Equal Pay Act are analyzed.[11] Parts V[12] and VI[13] consider attempts by employers to avoid their reinstatement obligations based on reasons unrelated to the use of FMLA and the employee's inability to perform, respectively. Part VII examines the employer's duty to reinstate those returning from FMLA leave to either the same or an "equivalent" position.[14] The final section of the Article outlines the FMLA's "key employee" exception to the duty to reinstate.[15]

I. THE FMLA'S REQUIREMENTS

The FMLA entitles eligible employees to a maximum of twelve weeks of unpaid leave for health-related reasons.[16] The FMLA was enacted "to

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[7] A key employee according to the FMLA is "a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed." 29 U.S.C. § 2614(b)(2) (2002).

[8] *See infra* notes 16-43 and accompanying text.

[9] *See infra* notes 44-102 and accompanying text.

[10] *See infra* notes 103-42 and accompanying text.

[11] *See infra* notes 143-64 and accompanying text.

[12] *See infra* notes 165-92 and accompanying text.

[13] *See infra* notes 193-234 and accompanying text.

[14] *See infra* notes 235-75 and accompanying text.

[15] *See infra* notes 276-98 and accompanying text.

[16] 29 U.S.C. § 2612 (1999); *see supra* note 2.

balance the demands of the workplace with the needs of families" and "to entitle employees to take reasonable leave for medical reasons."[17] These purposes were based on findings that there was "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods."[18] One court found that "[t]he FMLA was enacted to help working men and women balance the conflicting demands of work and personal life" by "recognizing that there will be times in a person's life when that person is incapable of performing her work duties for medical reasons."[19]

The FMLA also provides relief for families who are faced with issues of child care or care for a parent. Congress found that 96% of fathers and 65% of mothers worked outside the home in 1993.[20] This return to work by mothers, combined with a rise of single families to 27% of all family groups with children, forced employees to choose between caring for their loved ones and retaining their employment.[21] Congress considered the overwhelming testimony of health care professionals illustrating the benefits to families provided by having caregivers available for newborns, children with illnesses, and parents in need of care.[22] Before the enactment of the FMLA, Congress found that approximately 11% of caregivers were forced to quit or be fired because of their caregiving responsibilities.[23] The authors of a U.S. Small Business Administration ("SBA") survey estimated that 150,000 employees lost their jobs each year due to the lack of medical leave.[24] This survey, conducted prior to the passage of the FMLA, found that 70% to 90% of employers only offered leave of a variable or unspecified length, which "offer[s] little security to employees if employers do not guarantee some minimum length of leave."[25]

Employee rights under the FMLA were not intended to be unlimited. The Senate Report on the FMLA suggested that the FMLA would "help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness" and would reduce the financial burden on the public sector, which typically supports

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[17] 29 U.S.C. § 2601(b)(1), (2) (1999).

[18] *Id.* § 2601(a)(4).

[19] Price v. City of Fort Wayne, 117 F.3d 1022, 1024 (7th Cir. 1997).

[20] S. REP. NO. 103-3, at 6 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 8.

[21] *Id.*

[22] *Id.* at 9-11, *reprinted in* 1993 U.S.C.C.A.N. 3, 11-13.

[23] *Id.* at 11, *reprinted in* 1993 U.S.C.C.A.N. 3, 13.

[24] *Id.* at 14, *reprinted in* 1993 U.S.C.C.A.N. 3, 17 (estimate by economists Eileen Trzcinski and William Alpert).

[25] *Id.*

families that fail.[26] Some information also suggests that allowance of family leave could make employers more efficient and productive. A 1990 study by the Southport Institute for Policy Analysis found that " 'caregiving not only causes stress for individuals, it may be a substantial drag on national productivity.' "[27] Additionally, " '[i]n a period where shortages of skilled labor are growing,' " the loss of 11% of caregiving employees, who have left the labor force to provide care, has a significant effect on employers' productivity.[28] Testimony before Congress confirmed that voluntary provisions of leave prior to the passage of FMLA not only lessened employers' hiring costs, training costs, turnover rate, and absenteeism, but also "command[ed] the respect and loyalty" of employees.[29] The SBA study specifically found that the loss of employees arising from the need to quit to care for another or themselves cost employers from $1131 to $3152 per employee, granting a leave request cost between $.97 and $97.78 per week of leave; thus the FMLA was estimated to cost employers $6.70 per employee per year.[30] Similarly, a four state study found that a significant majority of employers had not found the implementation of state family leave statutes costly or burdensome.[31]

To fulfill these purposes, the FMLA places certain restrictions on an employer's treatment of employees who seek leave under FMLA provisions. Under the FMLA, an employer cannot "interfer[e] with, restrain, or deny the exercise of or the attempt to exercise, any right provided."[32] The Act also prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made

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[26] *Id.* at 18, *reprinted in* 1993 U.S.C.C.A.N. 3, 20. A study conducted by the Institute for Women's Policy Research estimated "that workers without leave suffer added unemployment and earnings losses after childbirth or illness because they cannot return to their former jobs for total" annual losses of $607 million (childbirth) and $12.2 billion (serious illness). Lack of such leave results in annual costs for public programs such as welfare, supplemental security income, and unemployment insurance of $108 million (parental leave) and $4.3 billion (medical leave). *Id.*

[27] *Id.* at 7, *reprinted in* 1993 U.S.C.C.A.N. 3, 9 (quoting Susan E. Foster & Jack A. Brizius, *Caring Too Much? American Women and the Nation's Caregiving Crisis*, *in* WOMEN ON THE FRONT LINES: MEETING THE CHALLENGE OF AN AGING AMERICA (J. Allen & A. Pifer eds., 1993)).

[28] *Id.*

[29] *Id.* at 12, *reprinted in* 1993 U.S.C.C.A.N. 3, 15 (testimony of Geoffrey Carter, small business owner).

[30] *Id.* at 17, *reprinted in* 1993 U.S.C.C.A.N. 3, 19.

[31] *Id.* at 14, *reprinted in* 1993 U.S.C.C.A.N. 3, 16.

[32] 29 U.S.C. § 2615(a)(1) (1999).

unlawful" by the FMLA.[33] Such discrimination includes taking action against employees because they have used FMLA leave.[34] An employer may not consider "the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions."[35]

In addition to these protections against discrimination, perhaps the most important guarantee of the FMLA is the right of an employee to return to work after taking leave.[36] The FMLA provides that an employee "shall be entitled, on return from leave (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."[37] Without this right, an employee might be allowed to take the leave but would have no job after using that leave. To protect this right of return, the FMLA specifically provides that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided."[38] The right to reinstatement has been characterized as a substantive right rather than an anti-discrimination provision.[39] Thus, intent is not relevant to an employee's ability to establish a FMLA violation for failure to reinstate.[40] If an employer refuses to reinstate an employee returning from FMLA leave for any reason, then the employer has violated the FMLA, unless the refusal to reinstate is otherwise allowed by the statute.

This reinstatement right is limited by the FMLA's provision that an employer need not provide any returning employee with "any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled" if the leave was not taken.[41] This limitation was included by Congress to ensure that employees' use of leave and requests to return to work "did not unduly infringe on employers' needs to operate their businesses efficiently and profitably."[42] According to the

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[33] *Id.* § 2615(a)(2).

[34] 29 C.F.R. § 825.220(c) (2002).

[35] *Id.*

[36] 29 U.S.C. § 2614 (a)(1) (1999).

[37] *Id.*

[38] *Id.* § 2615(a)(1); *see also* King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999).

[39] *See* Snow v. HealthSouth Corp., No. IP00-0151, 2001 U.S. Dist. LEXIS 5534, at *51-52 (S.D. Ind. Mar. 21, 2001).

[40] *See King*, 166 F.3d at 891.

[41] 29 U.S.C. § 2614(a)(3)(B).

[42] Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1120 (9th Cir. 2001).

Department of Labor, "[i]f the employee is unable to perform an essential function of the position because of a physical or mental condition," the employee has no right to job restoration.[43]

II. BURDEN OF PROOF

The positive right to reinstatement provided by the FMLA suggests that to state a claim an employee need only prove that the employer has refused to reinstate him or her. Some courts have followed this allocation of proof, allowing an employee to proceed to trial on the question of whether the employer has presented evidence of some legitimate reason to excuse the failure to reinstate.[44] These courts recognize that the burden should be on the employer to present evidence to support the affirmative defense that the employee would not otherwise be entitled to reinstatement.[45] Such an allocation of burden relieves the employee of an obligation to discover ways to invalidate the employer's reason for refusing to reinstate him and allows the trier of fact to determine whether those reasons are legitimate.

Yet, other courts have put the burden on the employee to disprove the legitimacy of employers' reasons for refusing to reinstate.[46] This allocation of burden tracks the framework first established in *McDonnell Douglas Corp. v. Green*, under which a plaintiff can only establish a claim of disparate treatment by carrying the burden of proving discriminatory intent through the establishment of membership in a protected class, an adverse action, and a connection between that membership and that adverse action.[47] The employer only needs to produce some evidence of a "legitimate, nondiscriminatory" business reason for the adverse action.[48] An employee can only defeat a motion for summary judgment on a claim of

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[43] 29 C.F.R. § 825.214(b) (2002).

[44] *See, e.g.*, Strickland v. Water Works Sewer Bd., 239 F.3d 1199, 1206-07 (11th Cir. 2001) (holding that summary judgment is improper where the plaintiff has sufficiently established an interference claim under FMLA).

[45] *See id.* at 1208; *see also* 29 U.S.C. § 2614(a)(3) (listing the limitations to reinstatement).

[46] *See, e.g.*, Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1018 (7th Cir. 2000) (holding that the employee must convince the trier of fact that the benefit falls under the provisions of FMLA). For an in-depth discussion of this approach, see Michael L. Murphy, Note, *The Federal Courts' Struggle with Burden Allocation for Reinstatement Claims under the Family and Medical Leave Act: Breakdown of the Rigid Dual Framework*, 50 CATH. U. L. REV. 1081 (2001).

[47] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also Strickland*, 239 F.3d at 1207.

[48] *McDonnell Douglas*, 411 U.S. at 802.

disparate treatment, if the employee presents enough evidence for a jury to conclude that the employer is covering up a discriminatory purpose.[49] Such an allocation of proof inappropriately undermines employees' right to reinstatement under the FMLA, consequently limiting the meaningfulness of the right to take up to twelve weeks of leave.

The burden allocation can be particularly significant in a trial court's decision on a motion for summary judgment. With a strong set of facts, summary judgment might be denied under either the *McDonnell Douglas* burden shifting analysis or the preponderance of the evidence test.[50] The significance of allocating the burden of persuasion can be illustrated by the claim of a dietary aide for a hospital who was dismissed after taking FMLA leave for stress and depression.[51] The employing hospital alleged that the aide had attempted to steal food from the hospital's kitchen the day before her leave began and claimed that consequently she was not entitled to reinstatement.[52] This trial court wisely analogized to retaliatory discharge claims and refused to grant summary judgment for the hospital based on questions of fact as to the legitimacy of the employer's reasons for refusing to reinstate her.[53] The court noted that if the aide had alleged retaliatory discharge, the evidence would also have precluded a summary judgment for the hospital.[54] If, instead, the burden had been placed on the employee, she may have been unable to disprove the hospital's allegation that the food was stolen.

There has been considerable disagreement as to which party should bear the burden of proof when an employee is denied reinstatement after FMLA leave. In its regulations, the Department of Labor stated:

> An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

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[49] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000). The *Reeves* Court recognized that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.*

[50] *See, e.g.*, Morgan v. FBL Fin. Servs., 178 F. Supp. 2d 1022, 1033-34 (S.D. Iowa 2001) (holding genuine issues of material fact exist that preclude summary judgment in an employee's action for retaliatory discrimination).

[51] Blankenship v. Buchanan Gen. Hosp., 140 F. Supp. 2d 668, 670 (W.D. Va. 2001).

[52] *Id.*

[53] *Id.* at 675.

[54] *Id.*

> . . . An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.[55]

This allocation of burden reflects the reality that an employee bringing the claim may not have knowledge of the reasons warranting a denial of reinstatement.

To protect an employee's right of reinstatement against frivolous reasons for denial, some courts have followed the Department of Labor guidelines and required that an employer prove that an employee seeking reinstatement would not otherwise have been employed at the time reinstatement is requested.[56] Under this method of proof, an employee establishes the right to reinstatement by demonstrating by a preponderance of the evidence that he or she is entitled to reinstatement as allowed under the FMLA.[57] The burden is then on the employer to avoid fulfilling its reinstatement obligation by showing "an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."[58] The employer then must prove that an employee would have been laid off or otherwise dismissed during the FMLA leave.[59] The employer meets that burden if, for example, an employer has included the position of an employee on leave as part of a reduction in force.[60]

The Eleventh Circuit relied on this allocation of burden in *Parris v. Miami Herald Publishing Co.* to deny a motion for summary judgment where the employee presented evidence that the employer would not have dismissed him if he had not taken leave, even though the *Miami Herald* did reach the independent decision to eliminate his position.[61] Parris had worked as a Distribution Manager, and his particular department was being restructured when he began his FMLA leave.[62] Prior to his leave, Parris was

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[55] 29 C.F.R. § 825.216(a) (2002).

[56] *See, e.g.*, O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1354 (11th Cir. 2000) (holding that an employer has the burden to demonstrate that discharge was inevitable despite FMLA leave).

[57] Strickland v. Water Works and Sewer Bd., 239 F.3d 1199, 1206-07 (11th Cir. 2001).

[58] *O'Connor*, 200 F.3d at 1354 (emphasis omitted).

[59] *Id.*

[60] *Id.*

[61] Parris v. Miami Herald, 216 F.3d 1298, 1302 (11th Cir. 2000).

[62] *Id.* at 1229-1300.

told that he would have until the end of 1996 to find another position.[63] Yet on July 31, still during his leave, Parris was dismissed.[64] Even though Parris had no greater rights than if he had not taken leave, the court reversed the summary judgment for the employer because the facts "raised a reasonable inference" that the employer would not have dismissed Parris if he had not taken the leave.[65] It was not clear that any specific date had been chosen for his dismissal prior to his leave.[66] Additionally, other employees in his department retained their position for a longer period.[67] Because the employer was not able to meet its burden of establishing that Parris would not have been retained in his position if he had not taken leave, he was entitled to a trial on his right of reinstatement claim.[68]

Similarly, the *Strickland* court reversed summary judgment for the employer, even though the employee was unable to show retaliation, because the employer could not establish as a matter of law that it would have discharged Strickland if he had not been on FMLA leave.[69] The employer failed to meet its burden because its dismissal letter did not mention the reason, which was eventually given by the employer as justification for the dismissal, and a reasonable jury could decide that Strickland was dismissed because he took leave due to his health condition.[70] These decisions in favor of employees seeking to return to work after their FMLA leave demonstrate the importance of putting the burden on employers to prove the legitimacy of their reasons for refusing to reinstate such employees.

The allocation of burden is also significant in the review of jury verdicts. The Tenth Circuit upheld a jury verdict in favor of an employee who was not reinstated, even though the jury was instructed that the employer carried the burden of showing that the employee was not entitled to reinstatement.[71] That court quotes language from *King v. Preferred Technical Group, Inc.* suggesting that the burden is on the employee,[72] yet

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[63] *Id.* at 1300.

[64] *Id.*

[65] *Id.* at 1302.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Strickland v. Water Works Sewer Bd., 239 F.3d 1199, 1208 (11th Cir. 2001).

[70] *Id.*

[71] Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 963-64 (10th Cir. 2002).

[72] *Id.* at 960 (quoting King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999)).

ultimately relied on the Department of Labor's regulation placing the burden on the employer.[73] The employee in *Smith* had been disciplined for failing to train some other employees prior to taking FMLA leave.[74] Yet the court held that the jury was reasonable in finding in her favor under the court's placement of the burden on the employer, where Smith was dismissed during her leave after having long years of service and no serious disciplinary actions taken against her prior to her leave, and her employer had failed to emphasize the importance of the training or provide a timeline for its completion.[75] Thus, Smith was given the opportunity to challenge the legitimacy of her employer's reasons offered to justify its refusal to reinstate her. By placing the burden on the employer, the *Smith* court respected the jury's finding that the employer's reason for failing to reinstate Smith was not legitimate.

In *Cross v. Southwest Recreational Industries, Inc.*, the court compared the employer's burden in a reinstatement claim with an employer's burden under the *McDonnell Douglas* analysis used for discrimination claims and found that the employer's burden in defending its failure to reinstate is "much greater . . . because the employer has both the burden of production and persuasion" to show that it would not have retained the employee absent the leave.[76] The *Cross* court compared placing this burden on the employer to the burden placed on employers under the National Labor Relations Act and the Equal Pay Act when asserting affirmative defenses thereunder.[77] The employer's motion for summary judgment was denied despite the employer's contention that the plaintiff's position had been temporary, where evidence showed the plaintiff's assigned duties had not been completed at the time of her dismissal.[78]

Relying on similar reasoning, a strong dissent in *Rice v. Sunrise Express, Inc.* argues that the employer should have the burden of proving

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[73] *Id.* at 963 (quoting 29 C.F.R. § 825.216(a)(1) (2002)). *See also* Drew v. Waffle House, Inc., 571 S.E.2d 89, 92 (S.C. 2002) (burden on employer to prove some other reason for failure to reinstate).

[74] *Smith*, 298 F.3d at 958-59.

[75] *Id.* at 961.

[76] Cross v. Southwest Recreational Indus., Inc., 17 F. Supp. 2d 1362, 1370 (N.D. Ga. 1998); *judgment entered*, No. 4:97-CV-0118-HLM, 1998 U.S. Dist. LEXIS 19066 (N.D. Ga. Aug. 25, 1998) (holding genuine issues of material fact existed regarding the employee's dismissal).

[77] *Id.* at 1370 (citing Maher Terminals, Inc. v. Director, Office Workers Comp., 992 F.2d 1277, 1282-84 (3d Cir. 1993); Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982)).

[78] *Id.* at 1370-71.

that a statutory entitlement does not apply to one of its employees.[79] Judge Evans points out that the employer has control of the relevant evidence, and therefore the employee who has taken FMLA leave should not be required to prove that the employer would not have provided the benefit absent the leave.[80] This allocation of the burden makes the right to reinstatement a meaningful one, rather than leaving the employee with an empty promise that can be avoided through an employer's motion for summary judgment.

Not all courts have adhered to the guidance from the Department of Labor that the employer should carry the burden of proving some legitimate reason for failing to reinstate an employee returning from FMLA leave. Instead, some circuit courts have put the burden on the employee to prove his statutory entitlement of reinstatement.[81] This allocation of the burden was adopted from courts' consistent placement of the burden on the employee when determining whether an employee had established a claim of interference with rights under the FMLA.[82] In *King v. Preferred Technical Group*,[83] *Chaffin v. John H. Carter Co.*,[84] and *Morgan v. Hilti*,[85] the employees alleged retaliation (that they had been dismissed or disciplined because of their prior use of FMLA leave)[86] while the plaintiffs in *Glecklen v. Democratic Congressional Campaign Committee*[87] and *Brungart v. Bellsouth Telecommunications, Inc.*[88] asserted that they were dismissed because they had requested leave.[89] In each of these situations, the employer's intent is important to determine whether the employee's rights under the FMLA have been violated. Since an employee alleging

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[79] Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1019-20 (7th Cir. 2000) (Evans, J., dissenting).

[80] *Id.*

[81] *See, e.g.*, Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-14 (7th Cir. 1997).

[82] *See* Brungart v. Bellsouth Telecommunications, Inc., 231 F.3d 791, 798 (11th Cir. 2000); Gleklen v. Democratic Cong. Campaign Comm., 199 F.3d 1365, 1368 (D.C. Cir. 2000); Smith v. First Union Nat'l Bank, 202 F.3d 234, 248 (4th Cir. 2000); King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999); Chaffin v. John H. Carter Co., 179 F.3d 316, 320 (5th Cir. 1999); Morgan v. Hilti, 108 F.3d 1319, 1323 (10th Cir. 1997).

[83] *King*, 166 F.3d at 887.

[84] *Chaffin*, 179 F.3d at 316.

[85] *Morgan*, 108 F.3d at 1319.

[86] *See King*, 166 F.3d at 891-92; *Chaffin*, 179 F.3d at 320; *Morgan*, 108 F.3d at 1325.

[87] *Glecklen*, 199 F.3d at 1368.

[88] *Brungart*, 231 F.3d at 794-95.

[89] *See Brungart*, 231 F.3d at 794-95; *Glecklen*, 199 F.3d at 1368.

retaliation had no other independent right to retain his job or escape discipline, he or she had to prove that the employer acted with discriminatory intent.

Some courts have relied only on a retaliation analysis in reviewing a dismissed employee's claim, even though the employers have also failed to reinstate their employees by dismissing them.[90] For example, the Sixth Circuit analyzed the dismissal of a employee just before the end of her leave solely under the retaliatory discharge framework, requiring that the employee show a causal connection between her leave and her dismissal.[91] Similarly, in *Santos v. Knitgoods Workers' Union*, the court entertained a motion to dismiss because the plaintiff failed to allege that she was dismissed because she had taken leave; the motion was only denied because the alleged facts, particularly the timing of the dismissal, showed a causal relationship.[92] This approach requires that the employee prove the employer's intent to retaliate, despite the employer's positive obligation to reinstate.

Courts have also applied this burden to plaintiffs asserting a positive right under the FMLA, such as reinstatement.[93] Under this burden, an employee must prove that the employer would have allowed his or her retention absent the leave.[94] This also would mean that the employee must prove that the employer did not offer the returning employee the same or equivalent job upon return from leave.[95]

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[90] *See, e.g.*, Wilson v. Lemington Home for the Aged, 159 F. Supp. 2d 186, 194-96 (W.D. Pa. 2001) (dismissal following failure to provide certificate that was not requested properly analyzed as both positive claim and retaliation claim); Leung v. SHK Mgmt., Inc., No. 98-3337, 1999 U.S. Dist. LEXIS 19417, at *41-47 (E.D. Pa. Dec. 21, 1999) (claim of employee dismissed while on leave only analyzed as retaliation claim).

[91] Chandler v. Specialty Tires of America (Tenn.), Inc., 283 F.3d 818, 825-26 (6th Cir. 2002).

[92] Santos v. Knitgoods Workers' Union, No. 99 Civ. 1499 (BSJ), 1999 U.S. Dist. LEXIS 9036, at *8-11 (S.D.N.Y. June 11, 1999), *dismissed on other grounds*, 252 F.3d 175 (2d Cir. 2001); *see also* Lacey-Manarel v. Mothers Work, Inc., No. 01 Civ. 0235 (JSR), 2002 U.S. Dist. LEXIS 5541, at *4-6 (S.D.N.Y. Mar. 29, 2002) (granting summary judgment to the defendants because the employee's dismissal was based on legitimate business reasons; no causal relationship between dismissal and FMLA leave).

[93] Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1018 (7th Cir. 2000); *King*, 166 F.3d at 891.

[94] *Rice*, 209 F.3d at 1018; *King*, 166 F.3d at 891.

[95] Watkins v. J & S Oil Co., 164 F.3d 55, 59 (1st Cir. 1998); *see also* Wilson v. Tarr, Inc., No. CV-99-1412-HU, 2000 U.S. Dist. LEXIS 13425, at *31 (D. Ore. Sept. 8, 2000) (burden on plaintiff purchasing agent to show that offered position

Under this allocation of the burden of proof, an employee still "bears the ultimate burden of establishing the right to [reinstatement]."[96] Thus, if an employer submits evidence that the employee would not have retained his or her position if he or she had not taken FMLA leave, "the employee must ultimately convince the trier of fact" that he or she would have retained the position if leave had not been taken.[97] An employee must prove affirmatively that the employer would not have discharged him or her if he or she had not taken the FMLA leave.[98]

The effect of this allocation of burden is illustrated by the outcome in *Rice v. Sunrise Express, Inc.*, which granted the employer's motion for a new trial after the original jury found a FMLA violation based on the lay off and eventual dismissal of Rice just four days before she was scheduled to return from her FMLA leave.[99] The *Rice* court recognized that because the "evidence was fairly close," the allocation of burden could have affected the outcome at trial.[100] Similarly, the Seventh Circuit upheld the judgment for the employer in *Kohls v. Beverly Enterprises Wisconsin, Inc.* because the employer presented evidence that Kohls had been discharged for poor performance, and she could not meet her burden of showing that she would *not* have been dismissed absent her taking of FMLA leave.[101] Noting that a court should not tell an employer how to discipline its employees, the *Kohls* court held that a showing of pretext does not necessarily satisfy the employee's burden.[102]

Rather than placing such a great burden on a plaintiff, who would otherwise be entitled to return to work after FMLA leave, courts should adhere to the Department of Labor's placement of the burden on the employer to justify the denial of reinstatement. Employers have the knowledge of business justifications for refusing to reinstate an employee. In contrast, placement of the burden on the employee places him or her in the position of proving a negative. For example, the employee would have

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was not equivalent).

[96] *Rice*, 209 F.3d at 1018; *see also* Kohls v. Beverly Enters. Wis., Inc., 259 F.3d 799, 804 (7th Cir. 2001) (citing *Rice*, 209 F.3d at 1018).

[97] *Rice*, 209 F.3d at 1018.

[98] *Kohls*, 259 F.3d at 804-05. *See also* Snelling v. Clarian Health Partners, Inc., 184 F. Supp. 2d 838, 846 (S.D. Ind. 2002) (citing Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997)); *Kohls*, 259 F.3d at 804.

[99] *Rice*, 209 F.3d at 1011.

[100] *Id.* at 1018.

[101] *Kohls*, 259 F.3d at 804-06.

[102] *Id.* at 806.

to prove that the employer would *not* have dismissed him or her absent the FMLA leave, which is an untenable position.

III. THE ROLE OF INTENT

In addition to this initial allocation of the burden of proof, courts should further protect an employee's right to reinstatement by rethinking the role of intent in determining whether the employer can avoid its duty to reinstate. Even if the court appropriately places the burden on the employer to prove the legitimacy of its reason for failing to reinstate an employee after FMLA leave, the employee should still be able to challenge the legitimacy of that reason. Just as an employee alleging a violation of the Equal Pay Act can show that the employer's reasons for the inequality of pay are based on discriminatory intent,[103] an employee who has been denied reinstatement should be able to show that an employer's reason is a pretext for punishing that employee for taking FMLA leave.

Since the FMLA provides for reinstatement as an entitlement, courts have generally agreed that an employee need not establish an employer's discriminatory intent to receive relief when reinstatement has been denied for any reason beyond the defenses provided in the statute. Section 2615(a)(1) contains no reference to the employer's intent, indicating that intent is irrelevant to a claim under this section.[104] The *Kaylor v. Fannin Regional Hospital, Inc.* court was perhaps the first to recognize that the FMLA created strict liability for denial of statutory rights.[105]

Since the *Kaylor* decision, many courts have recognized that a plaintiff asserting a positive right of reinstatement need not prove the employer's discriminatory intent.[106] In the context of dismissing an employee for taking

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[103] Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1998). *But see* Garner v. Motorola, Inc., 95 F. Supp. 2d 1069, 1074 (D. Ariz. 2000), *aff'd*, 33 Fed. Appx. 880, 2002 U.S. App. LEXIS 7408 (9th Cir. Ariz. 2002) ("The intentions of the employer are not a factor in determining liability under the Equal Pay Act.").

[104] 29 U.S.C. § 2615(a)(1) (2003). *See* Cross v. Southwest Recreational Indus., Inc., 17 F. Supp. 2d 1362, 1368 (N.D. Ga. 1998).

[105] Kaylor v. Fannin Reg'l Hosp., Inc., 946 F. Supp. 988, 997 (N.D. Ga. 1996).

[106] *See* Ogborn v. United Food and Commercial Workers Union, 305 F.3d 763, 769 (7th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 22481 (7th Cir. Oct. 25, 2002) ("proof of pretext is neither necessary nor sufficient"); Mann v. Mass. Correa Electric, No. 00 Civ. 3559, 2002 U.S. Dist. LEXIS 949, at *22 (S.D.N.Y. Jan. 23, 2002) (denying defendant's motion for summary judgment because plaintiff "need only show that she was entitled to an FMLA benefit and denied that entitlement by her employer"); Marrero v. Camden County Bd. of Soc. Servs., 164

FMLA leave, the Ninth Circuit has stated that "there is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an 'interference' claim under [the FMLA]."[107] Similarly, the Eighth Circuit has held that the *McDonnell Douglas* analysis should not be used to determine whether an employee had a right of reinstatement because she suffered from a "serious health condition" under the FMLA, since "claims under the FMLA do not depend on discrimination."[108]

Even though an employee is not required to prove discriminatory intent to establish an initial right of reinstatement, an employer's intent should be considered in assessing whether the employee would not have continued his or her employment if he or she had not taken FMLA leave. This determination necessarily requires an inquiry into the employer's intent in refusing to reinstate. Courts have taken different positions on whether evidence of pretext has any role in the analysis of a claim to enforce the positive right of reinstatement.[109]

Even though it upheld the summary judgment for the employer, the *Kohls* court imagined situations where the timing of a decision to dismiss an employee could support a factual inference that the employee would not have been fired if he or she had not taken leave.[110] For example, if a supervisor uses past known performance problems to justify a dismissal after leave has begun, then a fact finder may infer that the termination occurred because the employee took leave.[111] This language in *Kohls* comes

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F. Supp. 2d 455, 463 (D.N.J. 2001) (defendant cannot defend reliance on FMLA absences in dismissing plaintiff based on "legitimate, nondiscriminatory" basis for the dismissal).

[107] Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1131 (9th Cir. 2001).

[108] Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148 (8th Cir. 2001) (citing Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997)), *reh'g denied*, 2001 U.S. App. LEXIS 12885 (8th Cir. June 1, 2001).

[109] *See* Ogborn v. United Food and Commercial Workers Union, 305 F.3d 763, 769 (7th Cir. 2002) (stating that "in a suit charging violations of the substantive, as opposed to the anti-discrimination, provisions of the FMLA, proof of pretext is neither necessary nor sufficient to show a violation of the statute") (citing Kohls v. Beverly Enters. Wis., Inc., 259 F.3d 799, 806 (7th Cir. 2001); *Diaz*, 131 F.3d at 713; *Bachelder*, 259 F.3d at 1131). *Cf.* Chaffin v. John H. Carter Co., 179 F.3d 316 (5th Cir. 1999) (requiring plaintiff to prove pretext in order to overcome summary judgment for the employer); Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997) (affirming summary judgment for the employer because the employee "did not raise any material issues of fact as the [employer's] motivation" for dismissing her).

[110] *Kohls*, 259 F.3d at 806.

[111] *Id.*

close to allowing an employee to challenge the justification offered by an employer for failing to reinstate the employee if the employer's reasons lack credence.

Yet the Seventh Circuit has relied on its decisions in *Kohls* and *Diaz* to conclude that "proof of pretext is neither necessary *nor sufficient* to show a violation of the statute."[112] Such evidence of an employer's discriminatory intent "does nothing to negate" the evidence offered by an employer of reasons why the employee should not remain in its employ, according to *Ogborn v. United Food and Commercial Workers Union*.[113] The *Ogborn* court upheld a summary judgment for the employer based on the plaintiff's performance deficiencies, even though some of the information regarding his performance was not fully disclosed to the employer until after he began his leave.[114] He was then dismissed during his leave.[115] The court only considered whether the evidence showed that the employer would have dismissed Ogborn even if he had not taken his FMLA leave.[116]

Some courts have come closer to examining the employer's intent when reviewing a jury verdict finding a violation based on an employer's refusal to reinstate. As the Tenth Circuit explained in *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, regardless of whether the failure to reinstate was retaliatory, an employee can prevail under his or her statutory entitlement to reinstatement if he or she was denied that right "for a reason connected with her FMLA leave."[117] Under this reasoning, Smith presented sufficient evidence that she was entitled to reinstatement based on her "long years of service," the employer's failure to seriously discipline her prior to her leave, and "the lack of formal emphasis" on training a replacement before her FMLA leave.[118] The *Smith* court upheld the jury verdict in favor of Smith because she presented evidence from which a reasonable jury could have found that she would have been employed if she had not taken FMLA leave.[119]

Other courts have similarly entertained evidence on the invalidity of the employer's reasons for failing to reinstate the employee. The court in *Snelling v. Clarian Health Partners, Inc.* refused to grant the employer's

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[112] *Ogborn*, 305 F.3d at 769 (emphasis added).

[113] *Id.*

[114] *Id.* at 765-69.

[115] *Id.* at 766-67.

[116] *Id.* at 768-69.

[117] Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 961 (10th Cir. 2002).

[118] *Id.*

[119] *Id.* at 962.

motion for summary judgment in part because a reasonable juror could find that the employer's reasons for refusing to reinstate the employee were pretextual.[120] The court refused to rely on the employer's evidence that the employee "failed to provide appropriate customer service and support, . . . fail[ed] to meet performance goals, . . . and made misrepresentations regarding work accomplished."[121] In allowing an employee to argue that the employer's reason for refusing reinstatement was pretextual, the court's analysis for the right to reinstatement claim referred directly to its finding of evidence of pretext in relation to the retaliation claim.[122]

Some courts that place the burden on employers to justify the failure to reinstate employees have given those employees a limited opportunity to challenge the legitimacy of their employers' reasons for refusing to reinstate. Timing, a traditional factor in pretext analysis, has sometimes been considered in determining whether an employee should have been reinstated from leave. The *Smith* court upheld a verdict in Smith's favor, relying on the timing of Smith's dismissal only thirteen days before her date of return.[123] The court followed that reasoning in *Anderson v. Coors Brewing Co.*, in which the court held that a one and a half month time period between the leave and the employee's dismissal could establish causation.[124] In *Anderson*, the burden was placed on the employer to show that the aide would not otherwise be employed at the time she requested reinstatement from her FMLA leave.[125] The *Anderson* court had refused to grant the hospital's motion for summary judgment where the theft allegations only arose after Anderson had filed suit, and the hospital originally asserted that she was dismissed at the end of her twelve weeks of leave.[126]

Similarly, where an employee's position was eliminated within a month of requesting leave, the court in *Merli v. Bill Communications, Inc.* inferred that the decision was based on the use of that leave, despite the employer's contention that the position was eliminated as part of a staff reorganization.[127] Yet this same court concluded that an employee has no claim for

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[120] Snelling v. Clarian Health Partners, Inc., 184 F. Supp. 2d 838, 848-49 (S.D. Ind. 2002).

[121] *Id.* at 848.

[122] *Id.* at 849.

[123] *Smith*, 298 F.3d at 961.

[124] *Id.* (quoting Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999)).

[125] *Anderson*, 181 F.3d at 1179.

[126] *Id.*

[127] Merli v. Bill Communications, Inc., No. 01 CIV 0359 (LMM), 2002 U.S. Dist. LEXIS 4530, at *7, 19 (S.D.N.Y. Mar. 18, 2002).

denial of FMLA benefits where the request for FMLA leave was denied, even though the requestor's position was soon eliminated.[128]

Timing has also been used to disprove an employer's intent to take an action based on the employee's use of FMLA leave. The court in *Ahmarani v. Sieling & Jones, Inc.* relied heavily on the timing of the employer's decision to dismiss the plaintiff before the plaintiff requested leave, while recognizing that one can "imagine circumstances in which the timing of [the decision to fire an employee] could lead a fact finder to infer that the employee would not have been fired absent her taking of leave."[129] Thus, timing that suggests an intent to punish an employee for taking FMLA leave may be one way to establish the illegitimacy of an employer's reasons for refusing to reinstate an employee.

In addition to relying on suspicious timing, an employee may be able to undermine the employer's justification for failing to reinstate him or her by showing that the employer has not held other employees to the same standard. The court in *Morgan v. FBL Financial Services, Inc.* considered the employer's failure to adhere to its own job posting requirements before hiring another employee when it refused to grant the employer's motion for summary judgment on the plaintiff's claim that her dismissal interfered with her positive rights under the FMLA.[130]

In considering the employer's treatment of similarly situated employees, the court in *Gerking v. Wabash Ford/Sterling Truck Sales, Inc.* compared the burden on an employer who has refused to reinstate to the burden on an employer who must overcome direct evidence of discrimination in a "mixed-motive" discrimination claim.[131] Gerking's employer claimed that he was not reinstated based on allegations of sexual harassment made against him, but the employer had tolerated similar conduct by other employees in the past and had never implemented a sexual harassment policy.[132] Because Gerking raised issues of fact as to the legitimacy

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[128] *Id.* at *21-22.

[129] Ahmarani v. Sieling & Jones, Inc., 211 F. Supp. 2d 658, 659-61 (D. Md. 2002) (alterations in original) (quoting Kohls v. Beverly Enters. Wis., Inc., 259 F.3d 799, 806 (7th Cir. 2001)); *see also* Snelling v. Clarian Health Partners, Inc., 184 F. Supp. 2d 838, 854 (S.D. Ind. 2002) (timing used to find pretext to support both retaliation and failure to reinstate claims).

[130] Morgan v. FBL Fin. Servs., Inc., 178 F. Supp. 2d 1022, 1031, 1034 (S.D. Iowa 2001). The court noted that it would reach the same result under either the preponderance of evidence standard or under a *McDonnell Douglas* type of analysis. *Id.* at 1034.

[131] Gerking v. Wabash Ford/Sterling Truck Sales, Inc., No. IP IP00-0495-C B/K, 2002 U.S. Dist. LEXIS 17365, at *32 n.6 (S.D. Ind. Sept. 6, 2002).

[132] *Id.* at *32-34.

of the employer's reasons for not reinstating him, his employer was not granted summary judgment.[133] This approach appropriately differs from the typical "honest belief" defense under which an employer can defend a claim of disparate treatment by asserting that it had no discriminatory intent because the employer honestly believed in the legitimacy of its reasons for taking an adverse action.[134]

Even if an employer honestly believes that it has a legitimate reason for not reinstating an employee, the employer must still establish that the employee would have been dismissed if he or she had not taken leave. In a typical disparate treatment claim, an employer can escape liability if it honestly believed in the legitimacy of its reasons for taking an adverse action against an employee, since such a belief undermines a finding of discriminatory intent.[135]

In determining whether an employer interfered with an employee's right to use FMLA leave, the Ninth Circuit has declined to excuse an employer's refusal to reinstate an employee after FMLA leave based on the employer's honest belief in the legitimacy of its actions.[136] The court in *Bachelder v. American West Airlines, Inc.* reversed a summary judgment for an employer that had failed to reinstate an employee who the employer believed had exhausted all of her FMLA leave.[137] The employer's failure to reinstate was not excused by its good faith, particularly where the employer has the responsibility to determine whether an employee's leave is protected by the FMLA.[138]

Under this approach, an employer could not dismiss an employee based on its unfounded belief that the employee's absences were not protected by the FMLA.[139] An "honest belief" defense would undermine the employer's

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[133] *Id.* at *34. Note that the court reached the same conclusion on Gerking's FMLA interference claim, although it presented " a closer call." *Id.* at *34-39.

[134] *See, e.g.*, Pugh v. City of Attica, Ind., 259 F.3d 619, 626-27 (7th Cir. 2001) (employee failed to show that investigation of misappropriated funds reached wrong conclusion); Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998) (no pretext if employer can show that it honestly believed in reasons for action); Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 677 (7th Cir. 1997) (employer only needed to show that it honestly believed that employee was dishonest in extending leave).

[135] *See, e.g.*, *Smith*, 155 F.3d at 806 (employer need only make a reasonably informed and considered decision); *Kariotis*, 131 F.3d at 675-77 (question is not whether the employer's reasons are right but whether they are honest).

[136] Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1130 (9th Cir. 2001).

[137] *Id.*

[138] *Id.* at 1130-31.

[139] *Id.* at 1130.

obligation to determine whether leave is covered by the FMLA.[140] Thus, an employee need not prove that the employer's reasons are pretextual to survive a motion for summary judgment, particularly where the employer admits that use of leave was considered in dismissing the employee and had previously characterized the performance problems relied upon as "minor."[141] Such an employer may not be liable for liquidated damages, but it would be liable for actual damages resulting from such a dismissal.[142]

IV. WHY AND HOW INTENT SHOULD BE CONSIDERED

The role of intent in determining the scope of the right to reinstatement under the FMLA can be compared to the right to receive equal pay under the Fair Labor Standards Act's equal pay provisions. Looking to the Equal Pay Act ("EPA") is appropriate since both the EPA and the FMLA provide a positive right to employees that employers can only avoid based on some legitimate reason.[143] Unlike courts interpreting the FMLA's right to reinstatement, however, courts interpreting the EPA have not required an employee to carry the burden of proving the illegitimacy of an employer's reasons for failing to pay equal pay without considering evidence of the employer's discriminatory intent.[144]

Courts interpreting the Equal Pay Act have consistently required employers to justify payment of unequal wages, and employees can challenge such justifications with evidence of an employer's discriminatory intent.[145] The EPA provides that no employer:

> shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal

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[140] *Id.*

[141] *Id.* at 1131 n.22.

[142] *Id.* at 1130.

[143] Equal Pay Act of 1963, 29 U.S.C. § 206 (1999); The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (1999).

[144] *See, e.g.*, Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 762 (7th Cir. 2001) (citing the EPA stating that "a plaintiff must show either by an acknowledgment of discriminatory intent by the defendant or circumstantial evidence that provides the basis for an inference of intentional discrimination" (citing Troupe v. May Dep't Stores, 20 F.3d 734, 736 (7th Cir. 1994))).

[145] *See, e.g.*, Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 353 (4th Cir. 1994) (allowing plaintiff to present evidence that defendant's justification for higher wages for males could not be substantiated).

> skill, effort and responsibility, and which are performed under similar working conditions . . .[146]

unless the differential is justified by one of four statutory exceptions, i.e., some nondiscriminatory pay system.[147] The Secretary of Labor has the burden of showing that the employer pays different wages to employees of opposite sexes for the same work.[148] As with the right to reinstatement under the FMLA, under the Equal Pay Act, a plaintiff need not prove that the employer intended to discriminate against her.[149]

Under the EPA, upon a showing of a pay differential, the burden shifts to the employer to show that the differential is justified by one of the four statutory exceptions.[150] In an EPA claim that reached the Supreme Court, Corning Glass Works failed to carry this burden where the pay differential arose because of the "generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks."[151] The pay difference reflected the job market that allowed Corning to pay women lower wages and that "men would not work at the low rates paid to women."[152]

To carry its burden of justifying a proven pay differential, the employer must establish that the differential was based on a "factor other than sex" and that the gender neutral factor was adopted for a legitimate business reason.[153] This burden is a heavy one—the employer typically

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[146] 29 U.S.C. § 206(d)(1) (1998).

[147] *Id.*

[148] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[149] Tomka v. Seiler Corp., 66 F.3d 1295, 1310 (2d Cir. 1995); *Brinkley-Obu*, 36 F.3d at 344 n.17; Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1526 (11th Cir. 1992).

[150] *Corning Glass Works*, 417 U.S. at 196; *see also* Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796, 799 (6th Cir. 1998) (burden on employer in Equal Pay Act claim); Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1018 (11th Cir. 1994) (risk of nonpersuasion borne by the employer); Dole v. Alamo Found., 915 F.2d 349, 352 (8th Cir. 1990) (burden on employer to prove exception to Fair Labor Standards Act requirements); Sutton v. Engineered Sys., Inc., 598 F.2d 1134, 1136 n.3 (8th Cir. 1979) (burden on employer to prove applicability of overtime exemptions under Fair Labor Standards Act).

[151] *Corning Glass Works*, 417 U.S. at 204-05 (quoting Hodgson v. Corning Glass Works, 474 F.2d 226, 233 (2d Cir. 1973)).

[152] *Id.* at 205.

[153] *Tomka*, 66 F.3d at 1310 (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526-27, 526 and n.1 (2d Cir. 1992) (citing Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982))).

must establish "that the factor of sex provided *no basis* for the wage differential."[154] For example, a mere assertion that a male employee's higher salary is based on his experience may be insufficient to meet this burden, even without any evidence of discriminatory animus on the employer's part.[155]

To succeed on a motion for summary judgment, the employer "must demonstrate that there is no genuine issue as to whether the difference in pay is due to a factor other than sex."[156] At trial, the burden is again on the employer to establish that the difference in pay is due to factors other than sex.[157] For example, a jury verdict in favor of an underpaid female teacher was upheld based on evidence that the merit system that the employer relied upon to justify the pay differential was not neutral, but instead "was driven largely by an opaque, decision-making process at the administrative level" without reliance on peer assessment or department chair recommendations.[158] This allocation of burden under the EPA protects an employee's right to receive equal pay where the employer cannot justify pay inequities.

Even if the employer meets its burden under the Equal Pay Act, the plaintiff still has the opportunity to show with affirmative evidence that the reason given for the pay differential is pretextual or is offered as a post-event justification for the gender-based differential.[159] For example, one employee was allowed to rebut the employer's justification for the pay differential by alleging that the value placed by the employer on work experience was inconsistent.[160] The Sixth Circuit has clarified that this opportunity does not mean that the plaintiff bears the burden of persuasion on the affirmative defense—the plaintiff simply has the burden of producing evidence of pretext if the employer comes forward with evidence

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[154] Mulhall v. Advance Sec., Inc., 19 F.3d 586, 590 (11th Cir. 1994) (emphasis in original). *See also* Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995).

[155] *Tomka*, 66 F.3d at 1312-13.

[156] Brune v. BASF Corp., 41 F. Supp. 2d 768 (S.D. Ohio 1999), *aff'd in part, rev'd in part without op.*, 234 F.3d 1267, No. 99-3194, 2000 U.S. App. LEXIS 26772, at *14 (6th Cir. Oct. 17, 2000).

[157] Kovacevich v. Kent State Univ., 224 F.3d 806, 826 (6th Cir. 2000) (plaintiff introduced sufficient evidence for jury to find that her lower salary was the result of her sex).

[158] *Id.* at 827-28.

[159] *Irby*, 44 F.3d at 954; *see also* Brock v. Ga. Southwestern Coll., 765 F.2d 1026, 1036 (11th Cir. 1985) (holding that neither the college's "merit system" nor "supply and demand" are sufficient to overcome the gender-based differential).

[160] *Irby*, 44 F.3d at 956.

to prove that an affirmative defense applies.[161] Thus, an employee can reach a jury on an equal pay question even if the employer offers a justification for the pay differential, if a reasonable jury could find that the employer's policy is pretextual for paying differently based on sex.[162]

Giving employees an opportunity to show pretext does not mean that employees will always prevail. A plaintiff may not be able to show pretext based on justifiable differences in pay, even if the employer made some statements that might be seen as sex-related, if no rational jury could find that those statements meant that the plaintiff's pay differential was based on her sex.[163] The *Schwartz* court explained that an employer can rely on subjective reasons for pay differential, "[s]o long as subjective business justifications, not part of a merit system, are not overly subjective so as to render them incapable of being rebutted."[164]

These Equal Pay Act cases illustrate how a court could give an employee seeking reinstatement the opportunity to establish that the employer's reasons for refusing to reinstate are pretextual and that the employee should still be reinstated. This approach should be applied when a court determines whether an employer can escape its duty to reinstate after an employee takes leave under FMLA. Consideration of the employer's intent is appropriate when the employer justifies its refusal to reinstate based on performance or other reasons unrelated to the employee's use of leave, the employee's inability to perform job duties, and the employer's failure to return an employee to the same or equivalent work.

V. REASONS UNRELATED TO USE OF LEAVE

An employer may try to avoid its obligations to reinstate an employee after that employee has taken FMLA leave for reasons apparently unrelated to the employee's use of leave. If, for example, the employee had work deficiencies prior to her leave that were documented by her employer, then the employer may not need to reinstate that poorly performing employee.[165]

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[161] Kahn v. Dean & Fulkerson, P.C., 238 F.3d 421, *reported in full at* No. 99-1015, 2000 U.S. App. LEXIS 29386, at *20 (6th Cir. Nov. 13, 2000), *cert. denied*, 533 U.S. 916 (2001); Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796, 800 n.7 (6th Cir. 1998).

[162] *Buntin*, 134 F.3d at 800.

[163] *Kahn*, 2000 U.S. App. LEXIS 29386, at *26-27.

[164] Schwartz v. Florida Bd. of Regents, 954 F.2d 620, 623 (11th Cir. 1991).

[165] *See* Clay v. City of Chicago Dep't of Health, 143 F.3d 1092, 1094 (7th Cir. 1998).

To illustrate, the employer in *Kohls* adequately justified its dismissal of the plaintiff's claim due to the fact that the employee had mishandled and mismanaged funds before she went on leave.[166] Because the employee was aware of the ways the funds had been handled at the time, the decision to deny reinstatement was considered legitimate, even though the employer may not have communicated its concerns directly with the employee prior to her leave.[167]

Dismissal can be justified even if the employer did not know of the justification at the time the employee began his or her leave. In *Kohls*, for example, some performance deficiencies were only discovered after the leave began, and the court denied the employee's claim that the employer had no justification for refusing reinstatement at the time the employee began her leave.[168] The *Kohls* court rationalized its decision by referring to the judiciary's general reluctance to tell employers how to discipline their employees or how to deal with employees more fairly or effectively.[169] Similarly, the court in *Ogborn v. United Food & Commerical Workers Union* upheld the employer-union's refusal to reinstate a union business agent who had failed to process grievances adequately prior to his leave, even though these inadequacies were only discovered after the leave began.[170]

Because these employers were able to show that the reasons for refusing to reinstate were not discovered prior to the employees beginning their leave, the courts would not infer any ill intent on the employers' part. Yet these courts did not give the employees returning from FMLA leave an opportunity to convince a trier of fact that the employers' reasons for refusing to reinstate them were not legitimate. Dismissal of such claims enables employers to articulate reasons for refusing to reinstate an employee only after an employee has begun FMLA leave. Such an opportunity allows an employer to justify a refusal to reinstate even if its decision to deny reinstatement truly stems from the employee's use of FMLA leave.

Performance problems may sometimes justify an employer's failure to reinstate even if the employer was aware of these problems prior to the employee's use of leave. For example, the court in *Carpenter v. Northwest*

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[166] Kohls v. Beverly Enters. Wis., Inc., 259 F.3d 799, 805 (7th Cir. 2001).

[167] *Id.*

[168] *Id.* at 805-06.

[169] *Id.*

[170] Ogborn v. United Food & Commerical Workers Union, 305 F.3d 763, 768 (7th Cir. 2002).

Airlines, Inc. upheld the removal of a supervisor from her position one day after returning from leave based on her poor job performance prior to taking the leave, even though some of those problems had been recognized by the employer more than two months prior to the start of her leave.[171] This post-leave justification for an employer's refusal to reinstate opens the door for an employer decision based not on legitimate concerns about the employee's performance, but based on the employer's displeasure over that employee's use of FMLA leave.

Sometimes an employer's reasons for dismissing an employee have been deemed unworthy of credence, even if related to the employee's performance.[172] These courts come closer to allowing the employee an opportunity to show that the employer's refusal to reinstate is based on pretextual reasons. For example, the employer in *Nero v. Industrial Molding Corp.* refused to reinstate an employee based on its position that it dismissed him prior to the leave because he had not performed well.[173] Because of the suspicious nature of the documents relied upon by the employer to show that the termination had preceded the leave, the jury verdict in Nero's favor was upheld by the appellate court.[174] Such an approach helps to prevent an employer from relying on reasons that could have been created to cover up an adverse action based on an employee's use of FMLA leave.

Rather than refusing to reinstate based on an employee's past performance, an employer may also attempt to avoid the statutory reinstatement obligation by eliminating the employee's position before he or she even begins the FMLA leave. For example, a lead pump service technician who requested leave to undergo surgery was discharged when his employer decided to eliminate his position shortly after that request but before he started his leave.[175] He was not entitled to reinstatement since he had not begun his leave and did not have an independent right to request a transfer to another position prior to requesting leave.[176] Similarly, a staff attorney

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[171] Carpenter v. Northwest Airlines, Inc., 2002 U.S. App. LEXIS 20323 (8th Cir. Sept. 23, 2002), *aff'g* 2002 U.S. Dist. LEXIS 2146 (D. Minn. Feb. 5, 2002).

[172] Blankenship v. Buchanan Gen. Hosp., Inc., 140 F. Supp. 2d 668, 675 (W.D. Va. 2001) (theft allegation unworthy of credence where employee only learned of allegation during discovery in FMLA claim).

[173] Nero v. Indus. Molding Corp., 167 F.3d 921, 926 (5th Cir. 1999).

[174] *Id.* at 926, 928.

[175] Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 312-15 (6th Cir. 2001).

[176] *Id.* at 316.

whose position was eliminated after she had requested but had not yet taken leave could not demand reinstatement by her employer.[177] Neither of these courts fully considered whether the employer acted based on a discriminatory intent because the decision to eliminate the employees' positions was influenced by the employees' requests for leave.

The court in *Sauer v. McGraw-Hill Cos.* engaged in a deeper analysis of whether the plaintiff had a claim for failure to reinstate when the employer decided to eliminate her position while she was on leave.[178] The court found that the position was legitimately eliminated since the performance of her duties no longer constituted a single, distinct position, even though her duties were distributed among other employees.[179] To determine whether the position would have been eliminated if Sauer had not taken leave, the court determined that the reorganization did in fact occur in conjunction with reallocation of functions to another business unit.[180] The court also found that the decision to reorganize was a legitimate one since several other employees were affected by it.[181] The *Sauer* court relied on the same findings to conclude that the employer did not have an intent to retaliate against Sauer for her use of FMLA leave.[182]

The elimination or change in duties of a position while an employee is on FMLA leave can be challenged as an illegitimate reason for refusing to restore an employee to his position after that leave, if the court is willing to examine the validity of that reason. The *Voorhees* court, for example, refused to grant summary judgment to Time Warner, which claimed that it had reassigned the plaintiff's supervisory duties because of complaints from employees she supervised prior to her leave.[183] Several of those same employees offered affidavits that they had not made such complaints, thus undermining the employer's reasons for refusing to reinstate Voorhees in the same position.[184]

Similarly, the *Cross* court refused to find as a matter of law that the plaintiff's position had been eliminated where she had been told that the

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[177] Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1152, 1157 (7th Cir. 1997).

[178] Sauer v. McGraw-Hill Cos., No. 99-N1898, 2001 U.S. Dist. LEXIS 15936, at *52-53 (D. Colo. June 12, 2001).

[179] *Id.* at *54.

[180] *Id.* at *53.

[181] *Id.*

[182] *Id.* at *54-58.

[183] Voorhees v. Time Warner Cable Nat'l Div., No. 98-1460, 1999 U.S. Dist. LEXIS 13227, at *14-16 (E.D. Pa. Aug. 26, 1999).

[184] *Id.* at *15.

position was intended to be permanent and the process that she was implementing was not complete.[185] The employer's justification for failing to restore the employee did not absolve it from its responsibility to reinstate, even though the employer argued that the position was temporary and that the plaintiff had completed all the required tasks that fell under that position.[186]

The *Brenlla* court engaged in a similar review of the employer's justification for refusing to reinstate a comptroller for a car dealership based on its decision to eliminate her position.[187] The dealership had given the plaintiff's duties to another employee while she was on leave and then hired another clerical worker to perform similar duties.[188] The court specifically looked at whether the consolidation of positions was "motivated by legitimate business concerns."[189] The motivation was found to be questionable when the dealership claimed that it wanted to save the plaintiff's salary but soon hired another employee. Further, the decision was allegedly made in a fifteen minute meeting on the day the plaintiff was to return to work and the dealership failed to objectively assess who was best qualified for the new consolidated position.[190] Based on the dealership's questionable motive, the court concluded that the plaintiff's use of leave was the "sole determining factor" in eliminating her position and refusing to reinstate her in the newly created position.[191]

These cases illustrate how a court could provide an employee with the opportunity to challenge the reasons for the employer's refusal to reinstate him or her, even if those reasons are not directly related to his or her taking of FMLA leave. Yet many courts will grant a motion for summary judgment in favor of an employer who has eliminated or changed an employee's position while he or she was on FMLA leave without closely examining the employer's justification for doing so.[192] Instead, courts

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[185] Cross v. Southwest Recreational Indus., Inc., 17 F. Supp. 2d 1362, 1370-71 (N.D. Ga. 1998).

[186] *Id.* at 1370.

[187] Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc., No. 00 Civ. 5207 (JCF), 2002 U.S. Dist. LEXIS 9358, at *10-18 (S.D.N.Y. May 28, 2002).

[188] *Id.* at *13.

[189] *Id.*

[190] *Id.* at *13-16.

[191] *Id.* at *17. Note that the court upheld the plaintiff's retaliation claim for many of these same reasons. *Id.* at *19-25.

[192] *See, e.g.*, Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997); Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc., No. 00-Civ-5207, 2002 U.S. Dist. LEXIS 9358 (S.D.N.Y. May 28, 2002); and Sauer v. McGraw-Hill Cos., Inc., No. 99-N-

should allow such a claim to go to a jury to determine whether the employer's reasons for refusing to reinstate are legitimate and unrelated to an employee's use of FMLA leave.

VI. INABILITY TO PERFORM THE JOB

An employee's medical condition that justified his or her use of FMLA leave may hinder his or her right to return to work after that leave. Since an employer must only provide reinstatement if that employee would have been entitled to the position if the leave was not taken,[193] an employer can refuse to reinstate an employee returning from FMLA leave if that employee cannot perform the essential duties of the position.[194] For example, if an employee's disability prevents him or her from performing the duties of business manager, his or her employer need not reinstate him or her in that position following FMLA leave.[195] Similarly, a shipping attendant was not entitled to reinstatement because he could no longer lift heavy objects, stand for long periods of time, or work a ten hour day—all requirements of his former position.[196]

Employees who suffer a short term medical impairment that inhibits their ability to work for longer than twelve weeks may find themselves unprotected under either the FMLA or the Americans with Disabilities Act ("ADA").[197] Typically, the ADA will not provide any protection to a person who suffers only a temporary impairment because he or she is not "disabled" under the ADA's definition.[198]

1898, 2001 U.S. Dist. LEXIS 15937 (D. Colo. June 11, 2001).

[193] 29 U.S.C. § 2614(a)(3)(B) (2000).

[194] 29 C.F.R. § 825.214(b) (2003).

[195] Hatchett v. Philander Smith Coll., 251 F.3d 670, 675-76 (8th Cir. 2001); *see also* Alifano v. Merck & Co., 175 F. Supp. 2d 792, 795 (E.D. Pa. 2001) (termination upheld because employee unable to return to work at end of twelve weeks of leave).

[196] Reynolds v. Phillips & Temro Indus., Inc., 195 F.3d 411, 414 (8th Cir. 1999).

[197] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (3d Cir. 2002) (codified in scattered sections of 42 U.S.C.).

[198] Under the ADA, "[t]he term disability means, with respect to an individual —(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2003); *see* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); *see also* Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199-200 (4th Cir. 1997) (employee who suffered back injury did not suffer permanent or long term impairment so as to be

At the same time, if the employee cannot return to work within twelve weeks, he or she has no right of reinstatement under the FMLA.[199] If an employee receives the twelve weeks of FMLA leave and remains unable to perform the duties of his or her position, that employer does not violate the FMLA by dismissing that employee and filling his or her position.[200]

The expiration of an employee's twelve weeks of leave can legitimate the loss of reinstatement rights. However, an employee may not always be aware of when the twelve week period begins. For example, if an employee uses sick and/or personal time to cover part of the leave, the employee may not be aware that the employer is counting such time as part of the employee's twelve weeks of FMLA leave. Yet under the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, absent a showing of consequential harm, the employee would have no right of return even if the employer failed to inform the employee that her leave was being counted toward FMLA's twelve week limit.[201] The *Ragsdale* Court refused to follow the Department of Labor's regulations that would extend an employee's leave based on the period of time during which he or she was not informed that the employer was counting the time off as FMLA leave.[202]

The combination of *Ragsdale* and the lack of a duty to reinstate based on the expiration of leave provides employers with an additional opportunity to avoid reinstating employees by intentionally withholding information from them. This potential for abuse is illustrated by the claim of an employee who was dismissed while on leave when her employer had failed to designate the leave as FMLA leave, and therefore, she believed that she still had more leave available.[203] As the *Nusbaum* court observed,

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disabled under ADA); Cormier v. Littlefield, 112 F. Supp. 2d 196, 199 (D. Mass. 2000) (temporary knee injury "did not substantially limit [employee's] life activities and is thus not a 'disability' ").

[199] *See, e.g.*, Katekovich v. Team Rent a Car, Inc., 36 Fed. Appx. 688, 691 (3d Cir. 2002) (employee unable to show that she could have returned within twelve week leave period); Holmes v. e.spire Communications, 135 F. Supp. 2d 657, 666 (D. Md. 2001) (employee unable to return to work at end of twelve weeks of maternity leave); Soletro v. Nat'l Fed'n of Indep. Bus., 130 F. Supp. 2d 906, 911 (N.D. Ohio 2001) (employee unable to return at end of leave).

[200] Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 161-62 (2d Cir. 1999).

[201] Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155, 1161-63 (2002).

[202] *Id.* at 1163.

[203] Nusbaum v. CB Richard Ellis, Inc., 171 F. Supp. 2d 377, 380-81 (D.N.J. 2001).

> [t]he overall intent of the FMLA is lost when an employer fails to provide an employee with the opportunity to make informed decisions about her leave options and limitations. Without such an opportunity, the employee has not received the statutory benefit of taking necessary leave with the reassurance that her employment under proscribed conditions, will be waiting for her when she is able to return to work.[204]

Thus, an employer can fail to inform an employee until after the end of her twelve weeks of leave that it is being counted toward the FMLA limit and still refuse to reinstate him or her if he or she has not returned to work at the end of that twelve weeks.

The Supreme Court's decision in *Ragsdale* makes it essential that an employee be allowed to bring in evidence of an employer's discriminatory intent when challenging a refusal to reinstate after FMLA leave. Otherwise, an employer with intent to discriminate against an employee for taking FMLA leave can wait until the end of the employee's leave before informing him that he has used all of his FMLA leave and then dismiss that employee for even a disingenuous reason.

Since an employee must be able to perform his or her job duties to exercise the right of reinstatement, an employee's right to be reinstated when lacking an ability to perform those essential duties rests solely under the provisions of the ADA.[205] The Sixth Circuit made it clear that the FMLA claim of Williams was properly dismissed in *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.* because Williams could not show that she was able to work at the end of her leave or would eventually be able to return to work.[206] Notably, Williams convinced the Sixth Circuit that she was eligible for protection under the ADA, although the Supreme Court subsequently held that she was not disabled under the ADA.[207]

Unlike the ADA, the FMLA does not expressly require that an employer offer any accommodation to an employee returning from FMLA leave.[208] Because the employer is not required to accommodate, some

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[204] *Id.* at 386.

[205] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.).

[206] Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 845 (6th Cir. 2000), *rev'd on other grounds*, 534 U.S. 184, 122 S.Ct. 681 (2002); *see also* Cormier v. Littlefield, 112 F. Supp. 2d 196, 199 (D. Mass. 2000) (employee not ready to return to work after knee injury within twelve weeks).

[207] *Williams*, 224 F.3d at 843-45.

[208] *See* Green v. New Balance Athletic Shoe, Inc., 182 F. Supp. 2d 128, 138 (D. Me. 2002) (employer has no duty under FMLA to allow plaintiff to reduce work time to four hours per day due to medical condition); Alifano v. Merck &

courts have consistently held that an employee who cannot perform the duties of his position held prior to the leave has no right of reinstatement.[209]

Some courts have taken a less drastic view of the need for an employee to be able to perform previous job duties. Rather than using the criteria employed under the ADA, the Eighth Circuit has looked at whether the employee returning from leave can perform the essential functions of his or her job in his or her "current environment."[210] The *Duty* court later explained that this approach was appropriate to advance the FMLA's goal of maintaining job security.[211] Thus, it affirmed the jury's order to restore Duty to his former position even though he was limited in his ability to lift, which was sometimes required by his job.[212] The opinion suggests that Duty's right to return to work under the FMLA was more compelling than his rights under the ADA, even though his ADA claim was based in part on his request for a transfer to another position and the failure of his employer to entertain other requests for accommodation.[213]

Like the physical inability to perform essential job duties, time spent on the job can be considered an essential job duty for the purpose of excusing an employer from its obligation to reinstate an employee. In *Tardie v. Rehabilitation Hospital*, for example, the court held that the position of human resources director at a hospital was expected to work more than forty hours per week.[214] Because Tardie could not work more than forty hours per week, she was not entitled to reinstatement to that position.[215] Even if the FMLA required some accommodation by employers, such accommodation would not require a reduction of the hours that an employee must work or an indefinite period of leave if working regular

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Co., 175 F. Supp. 2d 792, 795 (E. D. Pa. 2001) (FMLA carried no obligation to accommodate serious health condition); Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 220 (D. Me. 2001) (employer had no obligation to accommodate loss of driver's license for health reasons).

[209] *See, e.g.*, Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 384 (3d Cir. 2002) (reinstatement properly denied to employee who could not perform the essential functions of his position).

[210] Stekloff v. St. John's Mercy Health Sys., 218 F.3d 858, 861-62 (8th Cir. 2000).

[211] Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 495 (8th Cir. 2002).

[212] *Id.* at 492.

[213] *Id.* at 492, 495.

[214] Tardie v. Rehab. Hosp., 168 F.3d 538, 543 (1st Cir. 1999); *see also* Summers v. Middleton & Reutlinger, P.S.C., 214 F. Supp. 2d 751, 757 (W.D. Ky. 2002) (employee not ready to return at end of twelve weeks of leave).

[215] *Tardie*, 168 F.3d at 544.

hours is essential for the position.[216] Thus, the *Tardie* court used the same analysis to determine both that the employer was not required to reinstate the employee and that the employee was not entitled to accommodation, which would enable her to work.[217]

To refuse reinstatement based on a requirement that an employee be available to work a particular schedule, the employer must show that such availability is essential to the position. The U.S. Postal Service showed that such availability was essential for a part-time flexible clerk position, despite the lack of such a requirement in the written job description and the postal service's failure to replace that clerk for six months after he attempted to return to work from his leave.[218] The court in *Routes v. Henderson* gave deference to both the employer's entitlement to define the essential functions of the position and the provision in the applicable collective bargaining agreement that such employees should be available to work the hours assigned to them during a seven day service week.[219]

If the employer retains the burden of proof, it must establish that the employee seeking reinstatement can no longer perform the essential job duties. Even though the employer in *Routes* established that availability to work seven days was essential, the employer failed to prove that the employee seeking reinstatement could not perform that essential duty.[220] Rather, Routes was released to work without restriction and did not state that he could only be available to work less than seven days per week.[221] The *Routes* court suggests that if an employer doubts the returning employee's ability to perform essential job duties, it should contact the employee's health care provider to clarify the employee's ability to perform such duties.[222]

Even though the FMLA does not require accommodation, the regulations do state that a returning employee shall be given a reasonable

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[216] *Id.*; *cf.* Nowak v. St. Rita High Sch., 142 F.3d 999, 1003-04 (7th Cir. 1998) (high school teacher unable to regularly attend classes denied indefinite leave of absence under ADA); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1186-88 (6th cir. 1996) (customer service representative denied indefinite medical leave); Myers v. Hose, 50 F.3d 278, 280 (4th Cir. 1995) (bus driver does not have a right to an "indefinite period of time to correct his" disability under the ADA). *But see* Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 35 (1st Cir. 2000) (punctual attendance not an essential job requirement).

[217] *Tardie*, 168 F.3d at 544.

[218] Routes v. Henderson, 58 F. Supp. 2d 959, 993 (S.D. Ind. 1999).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.* at 993 n.20.

opportunity to fulfill conditions of employment lost "as a result of the leave."[223] Examples given in the regulations include inability to attend a necessary course, renew a license, or fly a minimum number of hours.[224] This provision only allows a returning employee an opportunity to regain qualifications lost as a result of the leave itself rather than a result of a medical condition. For example, the plaintiff in *Jewell* could not take advantage of this provision because he lost his driver's license as the result of his medical condition, and he could not have prevented its loss by reducing or even eliminating the time on leave.[225] In contrast, the plaintiff in *Fejes v. Gilpin Ventures, Inc.* had the opportunity to regain her gaming license that expired during her leave.[226] This provision does not give employees any significant right to accommodation of their inability to perform essential job duties.

The limited definition of disability under the ADA[227] combined with the lack of a duty to accommodate under the FMLA can leave many employees without a right to return to work. For example, the court in *Rinehimer* held that an employee was not disabled under the ADA due to sensitivity to dust and fumes, which was neither substantially limiting nor a temporary case of pneumonia.[228] His employer did not regard him as disabled since he was allowed to perform other work after his leave.[229] Yet his condition prevented him from performing his previous position, so he had no right of return under the FMLA.[230]

The right to return to work under the ADA has been further limited by the Supreme Court's interpretation of the duty to accommodate in *U.S. Airways, Inc. v. Barnett*.[231] The *Barnett* Court outlined the circumstances under which an employer's obligation to retain or transfer a disabled employee to another position is limited by that employer's internal seniority provisions.[232] According to the Court, a request to transfer to or retain a position is unreasonable if it requires an employer to violate its seniority provisions.[233] A disabled employee can only force such an accommodation

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[223] 29 C.F.R. § 825.215(b) (2003).

[224] *Id.*

[225] Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 220-21 (D. Me. 2001).

[226] Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1494 (D. Colo. 1997).

[227] 42 U.S.C. § 12102(2) (2002).

[228] Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380-81 (3d Cir. 2002).

[229] *Id.* at 381-82.

[230] *Id.* at 384.

[231] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002).

[232] *Id.* at 1523-25.

[233] *Id.* at 1523-24.

by showing "special circumstances" which would require the employer to make an exception to the seniority system, such as incorporation of other exceptions in the system.[234] This decision allows a disabled employee to seek a transfer to accommodate his disability only if that employee can show "special circumstances" that would require the employer to make an exception to the seniority system, such as incorporation of other exceptions in the system.

Since the ADA may not provide a right to reinstatement for employees who do not qualify as disabled under its narrowing definition or whose employer has adopted a policy that would prevent transfer to another position, it becomes more important that an employee be allowed to show that the employer's claim that he or she cannot perform the essential duties of his or her position is pretextual. Given that opportunity, the employee has a better chance of asserting his or her right to reinstatement even if a medical condition limits his or her job performance in an unessential area.

VII. RETURN TO THE SAME OR EQUIVALENT WORK

If an employee is entitled to reinstatement, the employer must return him or her to the same position held prior to taking the leave or to an equivalent position.[235] An employee states an FMLA claim if her employer fails to return her to the same position she occupied prior to leave, particularly where she has been cleared by her physician to perform those duties.[236] The employer's recourse is to seek additional medical opinions to rebut the employee's certification that the employee can perform her previous duties.[237] Even though an employee retains the same pay and title, the employee is entitled to a trial to determine whether the new position is an "equivalent" position under the FMLA.[238]

If the employee's prior position no longer exists or has been filled, the employer must find equivalent work for the employee returning from leave. Congress intended that "equivalent" as used in the FMLA be interpreted by referring to the definition of discrimination in terms or conditions of employment as prohibited by Title VII.[239] A change in position can constitute an adverse action under Title VII if it results in "a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or]

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[234] *Id.* at 1525.

[235] 29 U.S.C. § 2614(a)(1) (2002).

[236] *See* Cooper v. Olin Corp., 246 F.3d 1083, 1086, 1090-91 (8th Cir. 2001).

[237] *Id.* at 1091.

[238] *Id.* at 1091-92.

[239] S. REP. NO. 103-3, at *3 (1993) (citing 42 U.S.C. § 2000e-2(a)(1) (1993)).

significantly diminished material responsibilities."[240] Typically, an adverse action under Title VII must result in the plaintiff's placement or retention in a position that is objectively worse in some respect.[241] For example, a transfer into a less prestigious position could constitute an adverse action where other employees sought to transfer out of that position and the change was seen as a demotion.[242] Similarly, courts have not recognized a transfer as an adverse action in an ADA claim if it caused no "objective harm" and reflected "a mere chip-on-the-shoulder complaint."[243] The focus tends to be on whether a "reasonable person in [the employee's] position would view the employment action in question as adverse."[244]

Although the statute does not define "equivalent," the Department of Labor has defined an equivalent position as one that is "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status."[245] Some employees have stated a claim under the FMLA because their employer did not return them to equivalent positions. An employer who filled a gas station manager position after its incumbent suffered a heart attack violated the FMLA for failing to reinstate him, not because the position was filled, but because the employer failed to find equivalent employment for the employee who took leave.[246]

Summary judgment may not be granted for the employer if the facts fail to show that the alternative position is equivalent and was offered to the

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[240] Kindred v. Northome/Indus. Sch. Dist. No. 363, 983 F. Supp. 835, 842 (D. Minn. 1997), *aff'd*, 154 F.3d 801 (8th Cir. 1998) (quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 135 (7th Cir. 1993)).

[241] Craven v. Tex. Dep't of Criminal Justice, 151 F. Supp. 2d 757, 766 (N.D. Tex. 2001); *see also* Joiner v. Ohio Dep't of Transp., 949 F. Supp. 562, 567 (S.D. Ohio 1996) (transfer adverse if "objectively *intolerable* to reasonable person") (emphasis added).

[242] LULAC Councils 4433 & 4436 v. City of Galveston, 979 F. Supp. 514, 518-19 (S.D. Tex. 1997); *see also* Sharp v. City of Houston, 164 F.3d 923, 933 (5th Cir. 1999) (In a § 1983 retaliation claim, a jury could consider transfer to be demotion if position proved to be objectively worse—less prestigious, less interesting, or less room for advancement.); Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996) (In a § 1983 retaliation claim, use of transfer to night patrol as punishment made plaintiff's transfer to night patrol adverse.).

[243] Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1453 n.21 (11th Cir. 1998).

[244] *Id.* at 1449.

[245] 29 C.F.R. § 825.215(a) (2003).

[246] Watkins v. J & S Oil Co., 164 F.3d 55, 59 (1st Cir. 1998).

returning employee.[247] The employer cannot rely on an ambiguous offer for an "ill-defined, not yet fully conceived, and quite possibly [non]equivalent" position.[248] The court in *Wilson* held that the employer did not adequately justify its failure to return Wilson to her previous position where it had hired a replacement for her and subsequently made the replacement permanent, yet only offered her the possibility of another position.[249] Even though Wilson offered evidence that her supervisor had made negative comments about her pregnancy prior to the start of her leave, the court did not consider this evidence in determining whether she was offered an equivalent position as required by the FMLA.[250]

The employee should enjoy the same pay and benefits as prior to leave. For example, there was no question that a reduction from $550 per week to $7.00 per hour, combined with increased health insurance costs and loss of life insurance coverage, did not constitute equivalent work.[251] Similarly, pay may not be equivalent where the returning employee's per hour wage dropped due to a loss of production incentives during training.[252]

Typically, a claim for disparate treatment must establish that the action taken was materially adverse to the employee—more disruptive "than a mere inconvenience or an alteration of job responsibilities."[253] In contrast to FMLA claims for reinstatement, Title VII cases have recognized that without a reduction in pay, a transfer might not constitute an adverse action.[254] Even the reduced chance for sales for a sales person who is paid

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[247] Wilson v. Tarr, Inc., No. CV-99-1412-HU, 2000 U.S. Dist. LEXIS 13425, at *32 (D. Ore. 2000).

[248] *Id.*

[249] *Id.* at *31-39.

[250] *Id.* at *38-39.

[251] Hanna v. Pay-and-Save, Inc., No. 5:00-CV-430-C, 2001 U.S. Dist. LEXIS 20095, at *2, 14 (N.D. Tex. Dec. 5, 2001).

[252] Green v. New Balance Athletic Shoe, Inc., 182 F. Supp. 2d 128, 138 (D. Me. 2002).

[253] Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996) (materiality shown by demotion including decrease in salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities) (quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)); *see also* Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999) (only adverse with "tangible change in duties or working conditions that constitute[ ] a material employment disadvantage" (quoting Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (alteration in original))).

[254] Flaherty v. Gas Research Inst., 31 F.3d 451, 456-57 (7th Cir. 1994); *see also* Tyler v. Ispat Inland, Inc., 245 F.3d 969, 972 (7th Cir. 2001) (lateral transfer without change in salary or benefits not an adverse action); Joiner v. Ohio Dep't

partly in commission may not be able to show an adverse action, particularly where the effect on the commission is a small fraction of the employee's total income.[255] Yet a diminished opportunity for promotion, if combined with other factors, may make a transfer an adverse action under Title VII.[256]

Employers may wish to place an employee returning from FMLA leave on a different shift. However, the right to an equivalent position may include placing the returning employee on the same shift if the employee's position has not been eliminated, even if the employee's former position has been filled.[257] Where a hospital routinely hired nurses for a particular shift and the employee returning from leave has worked a certain shift for over two years, the employer has not offered an equivalent position if the returning employee is offered a different shift.[258]

In contrast to courts recognizing the employee's interest in remaining on the same shift as part of the substantive right of reinstatement, a change in shift alone may not constitute an adverse employment action for purposes of proving retaliation under the FMLA.[259] Similarly, transfer of an employee to a different shift may not constitute an adverse action to support a claim for disparate treatment under Title VII, if the employee's pay, benefits, and responsibilities remain the same.[260] Yet forcing an employee to work a split shift, along with reducing her hours and changing her duties, can force an employer to go to trial on the issue of whether an adverse action has been taken under the ADA.[261] Thus, some courts have

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of Transp., 949 F. Supp. 562, 567 (S.D. Ohio 1996) (same pay and benefits outweighed difference in title and duties to establish lack of adverse action).

[255] Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).

[256] Stembridge v. City of New York, 88 F. Supp. 2d 276, 283 (S.D.N.Y. 2000), *aff'd without op.*, No. 00-7668, 2000 U.S. App. LEXIS 38697 (2d Cir. Dec. 18, 2000) (adverse action shown in part by lack of promotion opportunities); Kauffman v. Kent State Univ., 21 F.3d 428 (6th Cir. 1994) (reduction of promotion opportunities alone did not show adverse action).

[257] 29 C.F.R. § 825.216(a)(2) (2001).

[258] Hunt v. Rapides Healthcare Sys., LLC, 277 F.3d 757, 766-67 (5th Cir. 2001), *reh'g denied*, 2002 U.S. App. LEXIS 5061 (5th Cir. Jan. 30, 2002).

[259] *Id.* at 769.

[260] *Id.*; Craven v. Tex. Dep't of Criminal Justice, 151 F. Supp. 2d 757, 765-66 (N.D. Tex. 2001) (failure to grant plaintiff's request for transfer to day shift was not adverse action); *see also* Benningfield v. City of Houston, 157 F.3d 369, 377 (5th Cir. 1998) (In a § 1983 retaliation claim, transfer to night shift alone did not constitute adverse action.).

[261] Rizzo v. Children's World Learning Ctrs., 84 F.3d 758, 765 (5th Cir. 1996) (disabled employee defeated motion for summary judgment).

been willing to grant an employee returning from FMLA leave more advantages under their right to equivalent work than they might otherwise enjoy.

Like a shift change, a reduction or change in duties can also support a claim that the employer has not restored the employee to an equivalent position. The *Voorhees* court refused to grant a summary judgment for Time Warner after it reassigned some of its customer service manager's duties, including supervisory responsibilities, even though the plaintiff suffered no loss of pay or benefits.[262] Similarly, the restoration of a statistical process control coordinator to the position of "creeler" in a manufacturing plant did not constitute restoration to a position with the same responsibilities, skill requirements, and authority.[263]

In the Title VII context, courts sometimes have recognized that a change of duties can constitute an adverse action which supports a claim of disparate treatment or harassment. If an employee has been required to perform more menial tasks and has less opportunity for salary increases, he or she may have suffered an adverse action.[264]

Conversely, a different laundry worker position can be considered equivalent as a matter of law.[265] The *Vasquez* court held that even though the position offered to the plaintiff when returning from leave involved more standing, lifting, worse smells, and could lead to a reduction in pay in the future, the position was sufficiently equivalent for FMLA purposes.[266] The court did not consider that this less attractive position may have been offered to "punish" Vasquez for taking FMLA leave.

Like the *Vasquez* court, courts interpreting Title VII have not always recognized an adverse action based on a change of job duties. A change in duties or working conditions that does not cause any material significant disadvantage to the employee may not constitute an adverse action to support a disparate treatment claim.[267] For example, a school custodian who

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[262] Voorhees v. Time Warner Cable Nat'l Div., No. 98-1460, 1999 U.S. Dist. LEXIS 13227, at *13 (E.D. Pa. Aug. 26, 1999).

[263] Cross v. Southwest Recreational Indus., Inc., 17 F. Supp. 2d 1362, 1370 n.1 (N.D. Ga. 1998).

[264] McCabe v. Sharrett, 12 F.3d 1558, 1564 (11th Cir. 1994).

[265] Vasquez v. N. Ill. Hosp. Servs., Inc., No. 00C50100, 2002 U.S. Dist. LEXIS 5257, at *5-6 (N.D. Ill. Mar. 15, 2002).

[266] *Id.* at *5.

[267] Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (stating that reassignment to job with different duties and more stress not an adverse action); *see also* Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885-86 (6th Cir. 1996) (holding that there was no adverse action where employment duties

was, among other things, given "additional responsibilities above what was expected of male custodians" and above what she reasonably should have been given did not suffer an adverse employment action, even though the assignment of extra duties could help establish sexual harassment.[268] Yet since the FMLA provides for a positive right of reinstatement, courts should be wary in adopting the limited definition of an adverse action based on a change of duties when enforcing this right.

Employers can take the returning employee's physical capabilities into account in determining what would constitute equivalent work.[269] The *Watkins* court upheld a verdict in favor of Watkins' FMLA claim where his employer had discussed an office job or a gas attendant job with him after a medical condition prevented Watkins from performing the duties of store manager.[270] The court indicated that even if he could no longer perform those duties, the other positions discussed may not have been equivalent.[271]

To avoid an obligation to reinstate an employee after FMLA leave, an employer may sometimes argue that a position is not equivalent to avoid restoring the employee to such a position. If the pay, benefits, and working conditions are similar, the positions may be deemed equivalent.[272] Even if the employer claims that the position sought by the returning employee requires additional skills, the employer cannot refuse reinstatement to that position if other applicants have not been held to the same standard.[273]

An employer's intent to take an adverse action against an employee because he or she has taken FMLA leave can be masked by the employer's failure to return that employee to the same or equivalent work. In the Title VII context, employees alleging that they have suffered an adverse action can rebut the employer's legitimate business reasons for placing them in a different position by presenting evidence that those reasons are a pretext for

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were not materially modified); Kindred v. Northome/Indus. Sch. Dist. No. 363, 983 F. Supp. 835, 842 (D. Minn. 1997), *aff'd*, 154 F.3d 801 (8th Cir. 1998) (asserting that being given a new bus route did not change duties or responsibilities of a bus driver).

[268] Haugerud v. Amery Sch. Dist., 259 F.3d 678, 691-92, 695-96 (7th Cir. 2001).

[269] Watkins v. J & S Oil Co., 164 F.3d 55, 59 (1st Cir. 1998).

[270] *Id.* at 56-59, 62.

[271] *See id.* at 59.

[272] *See* Vargas v. Globetrotters Eng'g Corp., 4 F. Supp. 2d 780, 784 (N.D. Ill. 1998).

[273] *See id.* at 782-84. The court denied the employer's summary judgment motion based on evidence that the employer sought to hold plaintiff to a higher standard than other applicants.

discrimination.[274] For example, the *LULAC* court determined that a reasonable jury could find that the employer's reason for transferring some Hispanic police officers to less prestigious positions was not legitimate where the police chief had made racial jokes regularly and the transfer policy he relied upon had not been used since it had been implemented eleven years prior, but was subsequently used to benefit white officers.[275]

Since Congress intended that courts follow the Title VII analysis when determining whether an employee has been returned to equivalent work after FMLA leave, courts should likewise consider evidence that the employer's reason for not offering the same or equivalent work was pretextual. Thus, courts should not take employers' presentations about the availability of work or the equivalence of work at face value, but should allow a finder of fact to determine whether the employer acted in good faith to try and return the employee to an appropriate position.

VIII. LIMITED DUTY TO REINSTATE KEY EMPLOYEES

Rather than trying to find the same or equivalent work for an employee returning from FMLA leave, employers can refuse to reinstate certain "key employees" to positions held prior to taking FMLA leave.[276] Key employees may only include those salaried employees "among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed."[277] However, if the employee receives a base salary that is less than the compensation received by other employees who are eligible for overtime, that employee may not be in the highest ten percent.[278]

To be considered a key employee, an employee must fit within the definition of a salaried employee used in applying the Fair Labor Standards Act.[279] An employee is not salaried, and therefore cannot be a key employee, if his or her salary is not for a predetermined amount unaffected by the number of hours worked, if the salary is subject to deductions for

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[274] *See* Kindred v. Northome/Indus. Sch. Dist. No. 363, 983 F. Supp. 835, 843-44 (D. Minn. 1997), *aff'd*, 154 F.3d 801 (8th Cir. 1998) (employee's evidence of pretext considered).

[275] LULAC Councils 4433 & 4436 v. City of Galveston, 979 F. Supp. 514, 520-21 (S.D. Tex. 1997) (denying motion for summary judgment).

[276] *See* 29 U.S.C. § 2614(b) (2002).

[277] *Id.* § 2614(b)(2).

[278] *See* O'Grady v. Catholic Partners Serv., No. 00C7144, 2002 U.S. Dist. LEXIS 2182, at *16-17 (N.D. Ill. 2002).

[279] 29 C.F.R. § 825.217 (2003) (citing 29 C.F.R. § 541.118 (2003)).

absences of less than a day for personal reasons, or due to discipline or lack of work.[280] Thus, if an employer deducts from an employee's pay for personal absences of less than a day, that employee may not be classified as a key employee.[281]

To avoid its reinstatement obligation, an employer also must establish that the denial of reinstatement is "necessary to prevent substantial and grievous economic injury to the operations of the employer."[282] An employer can only deny reinstatement if the reinstatement, not the use of leave, would cause the employer such injury.[283]

An employer that focuses only on the injury that would have resulted if the employee was not replaced while on leave has not established an injury that would justify a refusal to reinstate.[284] Yet some courts focus incorrectly on the injury that would result from the employee's leave rather than on the injury resulting from reinstatement.[285] The *Kelly* court granted summary judgment for the employer because the employer had no obligation to reinstate based on its finding that it was "reasonable for [the employer] to believe that [Kelly's] prolonged *absence* could cause a 'substantial and grievous economic injury'" to that employer.[286] The court found unpersuasive Kelly's evidence that some of the employer's agents wished to see her dismissed before the end of her leave—evidence which could tend to show that the alleged injury was not a legitimate concern.[287]

If the employer cannot avoid replacing the employee while on leave, the cost of reinstating the employee after the leave can be considered in evaluating the economic injury to the employer.[288] The regulations do not

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[280] *Id.* § 541.118(a) (2003). *See also* Auer v. Robbins, 519 U.S. 452, 460-62 (1997) (stating that an employee is not salaried if there is a significant likelihood that pay is subject to deductions based on hours of work performed or quantity of work performed); Takacs v. Hahn Auto. Corp., 246 F.3d 776, 781 (6th Cir. 2001), *cert. denied*, 534 U.S. 889 (2001) (concluding that the practice of deductions was shown by suspension of seven employees in eighteen months).

[281] *O'Grady*, 2002 U.S. Dist. LEXIS 2182, at *18.

[282] 29 U.S.C. § 2614(b)(1)(A) (2002).

[283] 29 C.F.R. § 825.218(a) (2003).

[284] *O'Grady*, 2002 U.S. Dist. LEXIS 2182, at *20.

[285] *See* Kelly v. DecisionOne Corp., No. 00-CV-968, 2000 U.S. Dist. LEXIS 17508, at *5 (E.D. Pa. Dec. 6, 2000), *aff'd without opin.*, 276 F.3d 577 (3d Cir. 2001).

[286] *Id.* at *5, 8 (emphasis added) (quoting 29 C.F.R. § 825.218(b), (c)).

[287] *Id.* at *5-6.

[288] 29 C.F.R. § 825.218(b) (2003).

provide a precise definition of what constitutes substantial and grievous economic injury, but it is something more than "undue hardship" under the ADA.[289] Under the ADA, an undue hardship results if the accommodation would result in significant difficulty or expense in light of the employer's size, resources, and flexibility.[290] Under the FMLA, an employer may refuse to reinstate a key employee when there is a threat to the "economic viability of the firm" or by proving "substantial, long-term economic injury"; however, "[m]inor inconveniences and costs" do not satisfy the standard.[291]

The employer typically carries the burden of establishing that reinstatement would impose injury on itself. For example, a county government failed to carry that burden to avoid its obligation to reinstate its tax assessor.[292] Although the county showed it had reason to replace the plaintiff while he was on leave, it failed to explain why it could not return that employee's replacement to her prior position without sustaining injury, given that she only had an interim appointment to the plaintiff's position.[293]

Under the Department of Labor's regulations, an employer can rely on this exception to the general obligation to reinstate only if the employer notifies an employee of their "key" status at the time leave is requested.[294] This notice requirement was recognized by the court in *Panza v. Grappone Cos.*, even though the employer argued that it needed not give notice because the plaintiff's position was subsequently eliminated.[295] Even if the employer can later show substantial and grievous injury, the employer must

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[289] *Id.* § 825.218(c)-(d).

[290] 42 U.S.C. § 12111(10) (1995); *see also* Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1101 (8th Cir. 1999) (concluding that the costs and administrative burdens of creating irritant free environment would cause undue hardship); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (asserting that the employer carries burden of showing undue hardship); Rascon v. U.S. West Communications, Inc., 143 F.3d 1324, 1334-35 (10th Cir. 1998) (indicating that undue hardship not established by employer's need to cover duties of employee on leave); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (showing that a court may compare hardship to the benefits of accommodation to the employee).

[291] 29 C.F.R. § 825.218(c) (2003).

[292] Kephart v. Cherokee County, No. 99-1789, 2000 U.S. App. LEXIS 18924, at *18-20 (4th Cir. Aug. 4, 2000) (reversal of summary judgment).

[293] *Id.* at *20-21.

[294] 29 C.F.R. § 825.219(a).

[295] Panza v. Grappone Cos., No. 99-221-M, 2000 U.S. Dist. LEXIS 16390, at *4-5 (D.N.H. 2000).

reinstate if such notice was not given.[296] Thus, if an employer fails to inform an employee that his or her position is key at the time he or she requests leave, the employer cannot avoid reinstatement under Section 2614(b).[297]

Notice of an employee's classification as a "key" employee must be clear. For example, an optometrist who was told that she had "nothing to worry about" with respect to her position, that her replacement was only temporary, and who was given FMLA forms while being told that she might not be offered job restoration did not have clear notice that she might be denied job restoration.[298]

Although courts have placed the burden on employers to show that a position is equivalent and that an employee occupies a "key" position, employees seeking to challenge an employer's refusal to reinstate to an equivalent or key position should still have the opportunity to present evidence of an employer's intent to discriminate on the basis of an employee's use of leave. For example, an employer opposed to an employee's use of FMLA leave could create a situation where no equivalent work exists by eliminating the employee's position while he or she is on leave. The employee should be able to challenge that employer's refusal to reinstate not only in a retaliation claim, but also as a means of refuting the employer's justification for denying the positive right of reinstatement.

CONCLUSION

Since the FMLA's passage almost ten years ago, courts' interpretation of an employee's right of reinstatement has limited that right by placing the burden on employees to prove that the employer did not have a legitimate reason to refuse reinstatement. Even if a court appropriately places that burden on the employer to defend its failure to reinstate the employee, other courts have limited consideration of proof that the reason offered by the employer is really a pretext for adverse treatment based on the employee's use of FMLA leave.

To fulfill its promise to provide leave for employees to care for themselves or others, the FMLA should be interpreted to allow an employee a more meaningful right of reinstatement after taking FMLA

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[296] *Id.*; *see also* 29 C.F.R. § 825.219(a); The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2217 (Feb. 6, 1995) (asserting that failure to provide timely notice of key employee status results in loss of right to deny restoration, even if substantial and grievous economic injury will result from the restoration).

[297] *See Panza*, 2000 U.S. Dist. LEXIS 16390, at * 5.

[298] Thomas v. Pearle Vision, Inc., 251 F.3d 1132, 1140 (7th Cir. 2001).

leave. Without a job to return to, FMLA leave is nothing more than the right to quit. The courts can fulfill this promise by interpreting the FMLA's positive right of reinstatement as the rule rather than the exception and by adhering to the Department of Labor's placement of the burden on the employer to establish an exception to that right. Moreover, even though intent is not an element of entitlement to this right, employees who have taken leave should be given the opportunity to establish that the employer's proffered reason for not reinstating the employee is a pretext for denying the right because the employee has taken FMLA leave. Only then will employees enjoy a meaningful right to reinstatement as envisioned by the FMLA.